

## Message Text

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ACTION IO-15

INFO OCT-01 ISO-00 AF-10 ARA-11 EA-10 EUR-12 NEA-11  
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E.O. 11652: N/A  
TAGS: EGEN, UN, ECOSOC, EINV  
SUBJECT: UN WORKING GROUP ON CODE OF CONDUCT RELATING TO  
TRANSNATIONAL CORPORATIONS, SEPTEMBER 26: NATIONALIZA-  
TION/COMPENSATION

REFS: (A) USUN 3741; (B) USUN 3756; (C) USUN 3796;  
(D) USUN 3812

1. BEGIN SUMMARY: AS EXPECTED, DEBATE ON NATIONALIZATION  
AND COMPENSATION ISSUES IN SECTION IV B OF CODE OUTLINE  
FOLLOWED TRADITIONAL LINES. SINGLE "COMMON ELEMENT"  
(PARA 179) DRAFTED BY CENTER WAS CRITICIZED FROM ALL  
SIDES. US AND OTHER OECD DELS NONETHELESS URGED GROUP TO  
SEEK COMPROMISE SERIOUSLY AND CONSTRUCTIVELY ON THIS  
ISSUE; G-77 POSITION WAS EXTREME, AND SPOKESMEN GAVE NO  
INDICATION OF FLEXIBILITY. CHAIRMAN (NIKlasson, SWEDEN)  
ANNOUNCED INTENTION TO SEEK MANDATE FROM GROUP FOR A  
REVISION OF COMMON ELEMENTS IN TIME FOR JANUARY 1979 IGWG  
MEETING, BUT FELT THAT HE COULD NOT DEAL WITH IV B ON  
BASIS OF GROUP DISCUSSION TO DATE. GROUP WILL BE CON-  
SIDERING WHAT FURTHER MEASURES CAN KEEP ISSUE ACTIVE IN  
VIEW OF POLARIZED POSITIONS, INCLUDING PERSUASION OF  
CHAIRMAN TO DRAFT A REVISION IN ANY EVENT, AND POSSIBIL-  
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ITY OF COMPREHENSIVE TNC CENTER STUDY OF STATUS AND CON-  
TENT OF RELEVANT INTERNATIONAL LAW. US DEL (BOERNER)  
LATER MADE CLEAR IN PRIVATE INFORMAL CONVERSATION WITH  
NIKlasson AND OTHER KEY DELS, (INDIA, JAMAICA, GHANA, UK,  
USSR, GDR) THAT U.S. WAS NOT PREPARED TO CONSIDER NEW  
TEXT WHICH DID NOT INCLUDE FULL SECTION ON NATIONALIZA-  
TION AND COMPENSATION; NIKlasson SAID HE ACCEPTED THIS,

AND OTHERS MADE NO OBJECTION. END SUMMARY.

2. DEBATE ON SECTION IV B, NATIONALIZATION AND COMPENSATION ISSUES, SAW REITERATION OF TRADITIONAL VIEWS. US DEL TOOK LEAD WITH CRITICISM OF LACK OF BALANCE IN COMMON ELEMENT (PARA 179) BETWEEN "RIGHT" OF STATES TO NATIONALIZE AND THE "EXPECTATION" OF COMPENSATION. US DEL RESTATED US VIEWS ON INTERNATIONAL LAW RELATING TO NATIONALIZATION AND EXPROPRIATION, AND STRESSED "VITAL" IMPORTANCE TO U.S. OF THIS SECTION IN CODE. JAMAICA, ON BEHALF OF G-77, STRESSED THREE ELEMENTS UNDERLYING G-77 VIEW: (1) CLEAR RECOGNITION OF RIGHT OF STATES TO NATIONALIZE PROPERTY; (2) EXCLUSIVE APPLICABILITY OF NATIONAL LAW; AND (3) EXCLUSIVE JURISDICTION OF NATIONAL COURTS. HE STATED THAT TNES WERE NOT COMPARABLE WITH DOMESTIC ENTERPRISES, AND REJECTED RELEVANCE OF NON-DISCRIMINATION PRINCIPLE. INDIAN DEL LATER ADDED CONTRADICTORY THEME THAT DEVELOPED COUNTRY VIEWS WOULD LEAD TO THE "EXTRA-TERRITORIAL" STATUS, AND PREFERENTIAL DISCRIMINATORY TREATMENT OVER NATIONAL ENTERPRISES.

3. HEAVY OECD COUNTRY INTERVENTIONS SECONDED US POSITION. FRG DEL AND OTHERS RECALLED NIGERIAN DEL STATEMENT IN PREVIOUS IGWG DEBATE THAT GAPS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES ON THIS ISSUE MIGHT BE "ARTIFICIAL" AND CALLED FOR SERIOUS EFFORTS BY GROUP TO BRIDGE THEM. LIMITED OFFICIAL USE

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SWEDISH DEL WHO DID NOT STRAY FROM BASIC OECD POSITIONS, SUGGESTED STUDY BY CENTER TO PROMOTE PROGRESS ON ISSUE, ASSESSING THE "SERIOUSNESS" OF ACTUAL THE NATIONALIZATION DISPUTES, AND PRACTICAL EFFORTS TO DEAL WITH THEM (E.G., BILATERAL INVESTMENT TREATIES). JAPANESE DEL DREW ATTENTION TO ROLE OF DISINVESTMENT (FADE-OUT) ARRANGEMENTS.

4. VENEZUELAN DEL (NEW EXPERT FROM CARACAS) AND INDIAN QUESTIONED REFERENCE TO INTERNATIONAL LAW IN OECD COUNTRY POSITIONS, AND CONFUSED DISCUSSION BY HAMMERING AWAY AT THEME THAT TNES WERE PRIVATE LAW CREATURES AND COULD NOT BE SUBJECTS OF PUBLIC INTERNATIONAL LAW ON EQUAL PAR WITH STATES; VENEZUELAN DEL, HOWEVER, ACCEPTED POTENTIAL RELEVANCE OF INTERNATIONAL AGREEMENTS. VENEZUELAN DEL REJECTED ANY REFERENCE TO INTERNATIONAL ARBITRATION.

5. EAST BLOC DELS (GDR AND USSR) GENERALLY SECONDED G-77 THEMES, BUT WERE MORE RESTRAINED. GDR DEL NOTED THAT "JUST" OR "APPROPRIATE" COMPENSATION SEEMED THE MOST REALISTIC FORMULA FOR CODE, AND ACCEPTED REFERENCE TO ARBITRATION WHERE STATES FREELY AGREED TO SUCH A PROCEDURE. USSR DEL REJECTED INTERNATIONAL LAW REFERENCE ON

GROUND'S THAT TNE'S ARE NOT SUBJECT OF INTERNATIONAL LAW AND SHOULD NOT BE PLACED IN "BETTER" POSITION THAN NATIONAL COMPANIES; HE OBSERVED THAT GROWTH RATE OF TNC INVESTMENT IN LDC'S WAS DECLINING, BUT SAID MOST AUTHORITIES AGREED THAT THIS WAS UNRELATED TO NATIONALIZATION PROBLEMS.

6. IN SECOND INTERVENTION, US DEL REGRETTED TRADITIONAL LINES OF DISCUSSION, BUT NOTED THAT SECTION WAS VITAL AND COULD NOT BE DROPPED FROM CODE. HE PICKED UP ON USSR INTERVENTION, AND, WHILE AGREEING THAT NATIONALIZATION ISSUES PER SE WERE NOT RESPONSIBLE FOR DECLINING TNE INVESTMENT IN THIRD WORLD, NOTED THAT THEY CONTRIBUTED TO

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PERCEPTIONS OF OVERALL INVESTMENT CLIMATE. ADEQUATE RULES ON THIS SUBJECT PROMOTING INVESTOR SECURITY WERE ESSENTIAL, AND GROUP SHOULD SERIOUSLY WORK TO ACHIEVE COMPROMISE ON THIS ISSUE. US DEL URGED THAT EVEN IF US VIEW THAT INTERNATIONAL LAW NOW EXISTS IN THIS AREA WAS NOT ACCEPTED BY ALL, WE WOULD STILL BE FACED WITH TASK OF PROMOTING DEVELOPMENT OF IT IN CODE. US DEL COUNTERED EXCESSIVE G-77 EMPHASIS ON SOVEREIGNTY BY NOTING THAT ACCEPTANCE BY STATES OF INTERNATIONAL LEGAL FRAMEWORK FOR THEIR RELATIONS WAS AN IMPORTANT EXERCISE OF STATE SOVEREIGNTY. HE ATTEMPTED TO DEAL WITH CONFUSION OVER STATUS OF TNE'S UNDER INTERNATIONAL LAW BY NOTING ULTIMATE RESPONSIBILITY OF GOVERNMENTS TO PROTECT THEIR CITIZENS VIS-A-VIS OTHER STATES. US AND UK DELS ATTEMPTED TO DEAL WITH G-77 "PREFERENTIAL DISCRIMINATION" ISSUE BY STRESSING NEED FOR OBJECTIVE STANDARDS OF FAIRNESS, AND NOTING THAT NOT ALL INTERESTS IN OUR INVESTMENT WERE WITHIN TERRITORY OF THE

HOST COUNTRY. UK DEL RECALLED FAILURE OF AGREEMENT ON CERDS NATIONALIZATION LANGUAGE (CITED BY GHANA DEL), AND US REFERRED POSITIVELY TO UNGA RESOLUTION 1803, NOTING THAT US ACCEPTANCE OF FORMULA OF "APPROPRIATE" COMPENSATION THERE WAS MADE POSSIBLE BECAUSE OF SPECIFIC REFERENCE TO INTERNATIONAL LAW AS WELL AS NATIONAL LAW.

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7. NIKLASSON CONCLUDED DISCUSSION BY (CORRECTLY) DESCRIBING EXCHANGE ON THIS ISSUE AS DISAPPOINTING. HE SECONDED US OBSERVATION THAT REAL ISSUE WAS WILLINGNESS IN GROUP TO FORGE A COMPROMISE. HE RECOMMENDED DISPUTE SETTLEMENT ASPECTS BE DEFERRED TO SECTION IV-C (JURISDICTION), WHICH WAS SOLE AREA OF GROUP CONSENSUS. NIKLASSON SUMMARY OVER-EMPHASIZED "GENERAL ACCEPTANCE" BY ALL OF US RIGHT OF STATES TO NATIONALIZE PROPERTY, AND OVERLOOKED QUALIFICATIONS ON THAT RIGHT. NIKLASSON THEN ATTEMPTED TO FOCUS DISPUTE ON COMPENSATION ISSUES; HOWEVER, HE ENDORSED A LIMITATION IN TERM OF A REFERENCE TO RELEVANT INTERNATIONAL AGREEMENTS, WHICH WAS NOT OPPOSED. ON DISCRIMINATION ISSUE RAISED BY G-77, CHAIRMAN GINGERLY ENDORSED VIEW THAT FACT OF FOREIGN OWNERSHIP OF TNE MIGHT IN ITSELF BE GROUND FOR DISTINCTION IN TREATMENT BETWEEN TNES AND NATIONAL ENTERPRISES IN DISPUTE SETTLEMENT.

8. NIKLASSON STATED THAT HE INTENDED TO ASK GROUP FOR MANDATE TO REDRAFT COMMON ELEMENTS FOR JANUARY MEETING OF THE IGWG. HE FAILED TO SEE HOW THE GROUP'S DISCUSSION OF THIS ISSUE GAVE HIM ANY BASIS ON WHICH TO WORK. NIKLASSON ECHOED US DEL IN DOUBTING A CENTER PAPER ON THIS ISSUE WOULD BE HELPFUL. IRANIAN DEL (PARSI) WAS PESSIMISTIC THAT "FUNDAMENTAL" RIGHTS OF STATES COULD BE COMPROMISED. HE ALSO THOUGHT A CENTER PAPER MIGHT COMPLICATE RATHER THAN AID THE GROUP'S WORK. MEETING ENDED WITH NIKLASSON POINTING OUT LACK OF SETTLEMENT IN DISCUSSION FOR DROPPING THIS IMPORTANT AREA. HE THEREFORE CALLED FOR FURTHER THOUGHT ON HOW ISSUE SHOULD BE HANDLED, INCLUDING OPTION OF CENTER PAPER TO REVIEW ISSUES.

9. LATER IN SMALL INFORMAL MEETING OF KEY DELEGATES, NIKLASSON AGAIN RAISED THE QUESTION OF HOW TO PROCEED ON LIMITED OFFICIAL USE

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THE ISSUE OF NATIONALIZATION AND COMPENSATION. U.S. DEL SAID US WOULD FIND IT DIFFICULT TO AGREE TO AUTHORIZE

CHAIRMAN TO DRAFT NEW TEXT WHICH DID NOT INCLUDE A SECTION ON NATIONALIZATION AND COMPENSATION. HE THOUGHT CHAIRMAN SHOULD TAKE ON ISSUE DIRECTLY AND ATTEMPT HIS OWN FORMULATION. OTHER DELS, INCLUDING THOSE FROM G-77 AND EAST EUROPEAN BLOC, DID NOT OBJECT. AFTER DISCUSSION, NIKLASSON AFFIRMED HIS INTENTION TO ASK GROUP TO AUTHORIZE HIM TO DRAFT A NEW TEXT AND THAT THIS TEXT OF NECESSITY WOULD INCLUDE A SECTION ON NATIONALIZATION AND COMPENSATION. COMPREHENSIVE CENTER PAPER WOULD NOT BE FEASIBLE BECAUSE OF NIKLASSON DESIRE TO HAVE REVISED TEXT BY JANUARY IGWG MEETING. HE MAY, HOWEVER, SEEK CENTER CONTRIBUTION FOR HIS PERSONAL USE, AND US DEL HAS PREPARED INFORMAL SUGGESTIONS FOR CENTER EFFORTS. THIS SCENARIO MUST NOW BE PLAYED OUT IN CONCLUDING PLENARY MEETINGS. YOUNG

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## Message Attributes

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